Supreme Court, U.S.
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No. 90-1109

In The

Supreme Court of the United States

October Term, 1990

THOMAS LYNN SMITH,

Petitioner,

v.

HARBOR TOWING & FLEETING, INC. AND CHOTIN TRANSPORTATION, INC.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The sole question presented for review is whether the owner of a vessel owes a warranty of seaworthiness to a worker who is neither employed by the vessel owner nor engaged as a member of the crew of its vessel.

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STATEMENT OF THE CASE

The Petitioner was employed by Harbor Towing & Fleeting, Inc. to work as a deckhand aboard its harbor tugs. As its name suggests, Harbor Towing & Fleeting is a harbor fleeting service. Its facility is located on the lower Mississippi River near New Orleans, where it fleets and shifts the barges of its customers for a fee. Chotin Transportation,[1] the Respondent, operates an inland barge line.

On the date of his alleged accident, the Petitioner had been assigned to work as a member of the crew of one of his employer's harbor tugs. The captain of the tug instructed the Petitioner to make arrangements to ready two tank barges for towing across the Mississippi River. In the course of securing the barges together,[2] the Petitioner allegedly slipped, fell, and injured himself. The two barges were owned by the Respondent.

The two barges were unmanned. They had no crew of their own, nor were they designed with crew quarters or any other facilities to accommodate a crew. The barges lacked any motive power and could be navigated only through the use of harbor tugs and inland tow boats. In all essential respects, these were typical inland cargo barges, the floating equivalent of railroad tank cars. They were routinely relinquished to the care, custody and control of third parties who were relied upon to exercise that

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[1] Chotin Transportation, Inc. is a wholly-owned subsidiary of Midland Enterprises Inc.

[2] Contrary to the statement made in the Petitioner's brief, the two barges were not yet being moved at the time of the accident; they were still secured in the mooring facility operated by Harbor Towing & Fleeting.

degree of skill and care that was commensurate with their undertaking.

The Respondent had no personnel stationed to supervise barge operations, but it did exercise the normal prerogatives of a vessel owner. Prior to the incident sued upon, the Respondent arranged for a barge service to clean both barges and to have the cargo compartments certified as gas-free by a marine chemist. As owner, the Respondent had also made arrangements for both barges to be inspected by the United States Coast Guard, which issued the appropriate certificates of inspection. Less then twenty-four hours later, the barges were taken to the fleeting facility operated by the Petitioner's employer.

Neither the Petitioner's employer nor the particular harbor tug upon which he was working had any permanent working relationship with the Respondent's barges, and the Petitioner's presence on those two barges was to perform a task that was entirely transitory in nature. That task was to be carried out without any supervision whatsoever by the Respondent.

At issue here is a single claim: whether the Respondent owed a warranty of seaworthiness to the Petitioner.

SUMMARY OF ARGUMENT

I

The warranty of seaworthiness, as first developed and later refined in American maritime law, has always been confined to the *members of the crew* of a given vessel. Although there have been some permutations in the law

regarding the definition of a crewmember, the warranty of seaworthiness has never been applied from a vessel to the employee of a third-party contractor whose presence aboard the vessel is in a capacity other than that of a crewmember.

II.

The decision rendered in this case in no way disrupts the uniformity of admiralty law, but instead reaches a result in harmony with relevant precedent. The only inconsistency in maritime law which relates to the issue in this case concerns the elasticity of the definition given to a seaman or members of the crew. In that respect, this case implicates another matter presently before the Court, *McDermott International, Inc. v. Wilander*, No. 89-1474.

ARGUMENT

I

The present matter is not difficult to analyze. The Petitioner undoubtedly qualifies as a Jones Act seaman with respect to his employer's vessel: he was a member of the crew of that vessel, assigned to work aboard it as a deckhand. The Petitioner was not a member of the crew of the two unmanned tank barges, which he boarded to perform a transitory task, and which were brought within the scope of his own vessel's operations only in a transient fashion. As to those two barges, the Petitioner's seaman status was unavailing; it did not entitle him to

extra status or benefits, nor did it enlarge the barge owner's obligations.

The barge owner owed the same general duty to all who came aboard its vessels: the duty of exercising reasonable care under the circumstances. *Kermerac v. Compagnie Generale Transatlantique*, 358 U.S. 625, 79 S.Ct. 406, 3 L.Ed.2d 550 (1959). That duty was not heightened or increased by the Petitioner's status vis-a-vis his employer's vessel, and arguably might even by decreased, given that the Petitioner's employer was hired and paid to perform these services, and held itself out as having expertise in the area. The Petitioner's sole remedy against the Respondent is for negligence.

That is not to say that no confusion attends the subject. What has thrown a kink in an otherwise straightforward analysis of a typical maritime personal injury claim is the lingering effect of the decision in *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed.2d 1099 (1948), a case which, for most practical purposes, was overruled when Congress amended the Longshore and Harbor Workers' Compensation Act in 1972.[3] *Sieracki* gave stevedoring employees an unseaworthiness remedy against vessel owners, even though the workers were not employed by the vessel owner. The rationale by which the Court arrived at its holding that an employment relationship was not a necessary ingredient for the application of the warranty has considerable potency even now. What has led to confusion is the reasoning that,

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[3] See *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 99 S.Ct. 2753, 61 L.Ed.2d 521 (1979).

since stevedores did the work of "seamen," they were entitled to seamen's remedies. That holding no longer has potency, but it has been carelessly engrafted upon a variety of situations in which other maritime workers were thought to be performing the tasks of "seamen." What the Court said in *Sieracki*, however, is that stevedores had replaced the "members of the crew" of the ship in loading and unloading cargo, and it was this historical equivalency in status which served as a basis for extending the warranty of seaworthiness. To the *Sieracki* court, the job of a longshoreman was equated with that of a crew member: if *Sieracki* is read closely, it can be concluded that its holding reserves the remedy for unseaworthiness only to those workers who otherwise qualify as members of a vessel's crew, by doing the work of crew members. No distinction should exist between seamen and crew members, and therein lies the proper resolution of this case.

* * *

The *Sieracki* decision cannot be understood unless its context and jurisprudential antecedents are closely considered. The warranty of seaworthiness owed to seamen has been recognized in American maritime law ever since *The Osceola*, 189 U.S. 158, 23 S.Ct. 483, 47 L.Ed. 760 (1903), a decision which laid down a number of rules which were considered settled propositions. Among them was the principle that the vessel and its owner were "liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship. . . ." 189 U.S. at 175, 23 S.Ct. at 487. Later, the Court explained that the principles recognized in *The Osceola*, including the unseaworthiness remedy, formed "the general doctrine

concerning rights and liabilities of the parties when *one of a crew* sustains injuries while on a vessel in navigable waters." *Carlisle Packing Co. v. Sandanger*, 259 U.S. 255, 258, 42 S.Ct. 475, 476, 66 L.Ed. 927 (1922) (emphasis added).

Central to the rationale underlying the unseaworthiness remedy was the concept of an employment relationship between the seaman and the vessel owner. In *The Osceola*, for example, the Court upheld the validity of the "fellow servant" rule, absolving a vessel owner from liability to its seamen employees if injuries were caused by the negligence of fellow servants. The Court did not address the question of whether the owner was relieved of liability when an unseaworthy condition was caused by the negligence of fellow servants. That question was answered in *Carlisle Packing Co. v. Sandanger, supra*, which held that the unseaworthiness remedy was available "without regard to negligence. . . . " 259 U.S. at 259, 42 S.Ct. at 477, 66 L.Ed. at 930. This holding was amplified and explained in *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 102, 64 S.Ct. 455, 459, 88 L.Ed. 561 (1944):

> "In thus refusing to limit, by application of the fellow servant rule, the liability of the vessel and owner for unseaworthiness, this Court was but applying the familiar and then well established rule of non-maritime torts, that the employer's duty to furnish the employee with safe appliances and a safe place to work, is nondelegable and not qualified by the fellow servant rule."

The seaman's remedy for unseaworthiness was thus conceived as an adjunct to the employer's duty to provide a safe place to work, transported to the context of vessel

operations.[4] As originally envisioned, the seaworthiness doctrine was dependent upon an employer-employee relationship; it was confined to seamen who were employed by the vessel's owner or operator, and those seamen were understood to be members of the vessel's crew.

* * *

Between the passage of the Merchant Marine Act of 1920 ("Jones Act") and the Longshore and Harbor Workers' Compensation Act ("LHWCA") in 1927, stevedoring employees occupied an uncertain place in the law of maritime torts. An early definition of a Jones Act seaman, excluding stevedores from coverage, was given by the Ninth Circuit:

> "The [Jones Act] was not intended to and does not enlarge the definition of 'seaman' as it was then understood and accepted in admiralty law. Generally speaking, a seaman is any one who, by contractual employment with the owner, master, or charterer of a vessel, serves the vessel in navigation. He is not necessarily a sailor. He may be a cook, fireman, or even a bartender. A stevedore renders no service in actual navigation. It is true that he renders service incidental to navigation in loading and unloading vessels, a service which is maritime in its nature but he is a landsman and he does not belong on a vessel nor does he go with the vessel."

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[4] See *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52, 34 S.Ct. 733, 58 L.Ed. 1208 (1914) (longshoreman injured prior to passage of Jones Act was owed a safe place to work by his employer.)

Cassil v. United States Emergency Fleet Corp., 289 F.2d 774, 776 (CA9 1923).

Prior to the passage of the LHWCA, this Court reached a contrary result, holding that stevedore employees were entitled to the Jones Act remedy. *International Stevedoring Co. v. Haverty*, 272 U.S. 50, 47 S.Ct. 19, 71 L.Ed. 157 (1926).[5] It was the Court's view that longshoremen should be considered "seamen" under the Jones Act:

> "It is true that for most purposes, as the word is commonly used, stevedores are not 'seamen.' But words are flexible. The work upon which the plaintiff was engaged was a maritime service formerly rendered by the ship's crew. * * * . . . we are of the opinion . . . that in this statute 'seamen' is to be taken to include stevedores employed in maritime work on navigable waters . . . whatever it might mean in laws of a different kind."
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> *Id.*, 272 U.S. at 52, 47 S.Ct. at 19, 71 L.Ed. at 160.

The LHWCA was enacted within six months after the *Haverty* decision was rendered, and it was then acknowledged that Congress intended "to confine the benefits of the Jones Act to the members of the crew of a vessel," and to withdraw that remedy from stevedores who were not crew members. *Swanson v. Marra Bros.*, 328 U.S. 1, 7, 66 S.Ct. 869, 872, 90 L.Ed. 1045, 1049 (1946).

Nevertheless, the treatment of longshoremen as seamen was considered a fixed principle by the *Sieracki* court:

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[5] See also *Uravic v. F. Jarka Co.*, 282 U.S. 234, 51 S.Ct. 111, 75 L.Ed. 312 (1931).

> "Historically, the work of loading and unloading is the work of the ship's service, performed until recent times by members of the crew."
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> 328 U.S. at 96, 66 S.Ct. at 878, 90 L.Ed. at 1107.

Longshoremen, it was thought, faced the same character of risks, perils and hazards ordinarily confronting crewmembers, and were therefore entitled to the same general maritime law remedies against a vessel owner. This became the central holding in *Sieracki*:

> " . . . for injuries incurred while working on board the ship in navigable waters the stevedore is entitled to the seaman's traditional and statutory protections, regardless of the fact that he is employed immediately by another than the owner. For these purposes he is, in short, a seaman because he is doing seaman's work and incurring a seaman's hazards."
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> 328 U.S. at 99, 66 S.Ct. at 879-80, 90 L.Ed. at 1109.

This holding relied heavily upon the Court's perception that stevedoring work aboard a vessel in navigable waters constituted traditional "seaman's" work,[6] and upon its observation that the "trend and policy" of past jurisprudence favored extension of seamen's remedies to stevedores.

Past jurisprudence did indeed equate longshoremen with seamen. The major obstacle which the Court faced in *Sieracki* was that past jurisprudence also premised a seaman's remedy against a vessel owner upon an

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[6] The majority's point of view was sharply disputed in Justice Frankfurter's dissent, 328 U.S. at 105, 66 S.Ct. at 882, 90 L.Ed. at 1112.

employment relation with that owner. Before *Sieracki*, the "norm of the liability" in unseaworthiness claims had been the case of seamen under contract to a vessel owner. 328 U.S. at 90, 66 S.Ct. at 875, 90 L.Ed. at 1104. Thus, the *Sieracki* court framed the issue before it as whether longshoremen-seamen could sue for unseaworthiness when they had no employment contract with the vessel owner. *Sieracki*, by its own terms, expanded the norm of liability only in the sense that it eliminated the necessity of the employment relation. In the Court's view, stevedores were functionally equivalent to crew members aboard a ship, doing work historically performed by a crew. The issue decided in *Sieracki* was whether a vessel owner could escape liability for unseaworthiness by "having all who *man the ship*" hired by third parties. 328 U.S. at 92, 66 S.Ct. at 876, 90 L.Ed. at 1105 (emphasis added). The Court answered this question by stating that the owner should not be able to avoid its obligations by "parcelling out" its operations to intermediary employers who would then "take over portions of the ship's work. . . . " 328 U.S. at 95, 66 S.Ct. at 877, 90 L.Ed. at 1106.

The *Sieracki* court took as a given that the work of a stevedore represented a "specialization in labor and skill brought about by modern division of labor" and that stevedoring work actually belonged in the classification peculiar to a seaman's employment. 328 U.S. at 100, 66 S.Ct. at 880, 90 L.Ed. at 1109. This view, however, accurate it might have been, was entirely discarded when Congress amended the LHWCA to eliminate the *Sieracki* remedy for longshoremen. Two remnants of the *Sieracki* decision have nevertheless survived. First, *Sieracki* has been given limited application to claims of longshoremen

who are exempted from coverage under the LHWCA.[7] Second, *Sieracki* has been cited as authority for the proposition that the vessel owner need not be the direct employer of the seaman aboard its vessel to expose it to liability for unseaworthiness.

It is this second proposition that the Petitioner would parlay into a favorable holding. However, the *Sieracki* remedy is not as broad as the Petitioner conceives. Throughout *Sieracki*, the Court makes reference to the fact that longshoremen did work previously done by the ship's crew, those who "man the ship." *Sieracki* did not envision extending the warranty to workers whose services were not usually undertaken by "members of the crew." As in *Haverty*, the chief policy consideration that militated for application of the warranty to longshoremen was that they performed maritime services "formerly rendered by the ship's crew." Without this limitation, the warranty would have been owed to every variety of the multitude of shore-based personnel who provision, repair, inspect and otherwise provide services to a vessel.

The proposition that a vessel owner owes a warranty of seaworthiness to a "member of the crew" of its vessel, even though it does not directly employ that crew member, originated with *Sieracki*, and was later applied in the context of offshore oil operations, involving specialized vessels typically crewed by a variety of independent contractors.[8] Likewise, the *Sieracki* rationale applies to a

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[7] See pp. 14-15, *infra*.

[8] See, e.g., *Davis v. Associated Pipe Line Contractors, Inc.*, 305 F.Supp. 1345 (W.D.La. 1968); *Hebert v. California Oil Company*, 280 F.Supp. 754 (W.D.La. 1967).

vessel owner that bareboat charters its vessel to another party, which in turn employs the crew.[9]

The common thread that runs through these decisions is the requirement that the warranty be confined to members of the crew. This fact is overlooked by the Petitioner, but it was understood by the Court below, which readily concluded that, since the Petitioner did not qualify as a member of the crew of the Respondent's barges, no warranty of seaworthiness was owed.

II.

To the extent that the warranty of seaworthiness should only extend to "members of the crew" of a vessel, the question presented by this case implicates the issue raised in *McDermott International, Inc. v. Wilander,* No. 89-1474, which involves the legal definition of seaman status.

A good deal of confusion has been engendered in the jurisprudence over the definition of the term "seaman." Most of the attention given to the subject has addressed the issue in the Jones Act context. Within the Fifth Circuit, the defining principles were established in response to technological advances in the offshore oil industry, related to the use of movable drilling rigs. In *Offshore Co. v. Robison,* 266 F.2d 769 (CA5 1959), the Fifth Circuit was confronted with this new class of special-purpose "vessel," far removed in character from any type of watercraft

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[9] See, e.g., *Baker v. Raymond Intern., Inc.,* 656 F.2d 173, 184 (CA5 1981); *Solet v. M/V CAPT. H. V. DUFRENE,* 303 F.Supp. 980 (E.D.La. 1969).

that preceded it. These drilling rigs did not ply the waters of the world, but served their primary function by staying afloat in one place for extended periods of time, drilling holes in the seabed. In determining the rights and remedies of the workers employed aboard such vessels, the Fifth Circuit effectively created a new class of seamen; in doing so, it articulated principles that apply uniformly to a roustabout on a semi-submersible drilling rig and an able bodied seaman on a more conventional ship. Both workers attain seaman status by having a more or less permanent assignment to a vessel, or performing a substantial portion of their work there, and by doing work that contributes to the vessel's function or mission. Both types of workers can be considered members of their vessel's crew.

While other circuit courts have taken a less expansive view of the subject,[10] it is uniformly recognized that coverage under the Jones Act and the LHWCA is mutually exclusive. The Jones Act applies only to "seamen," while the LHWCA excludes coverage for "a master or member of a crew of any vessel." 33 U.S.C. §§902(3)(G) and 903(a). As used in the two statutes, the terms "seaman" and "member of a crew" have been held to be interchangeable. Thus, the Jones Act remedy for seamen is restricted to members of the crew, as that term is used in the LHWCA.

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[10] See *Johnson v. John F. Beasley Construction Co.*, 742 F.2d 1054, 1061 (CA7 1984) and *Simko v. C&C Marine Maintenance Co.*, 594 F.2d 960, 964-65 (CA3 1979).

With respect to coverage under the LHWCA, a legal anomaly does exist, involving an inter-circuit conflict of opinion. In *Aparicio v. Swan Lake*, 643 F.2d 1129 (CA5 1981), the Fifth Circuit held that a maritime employee who was exempted from LHWCA coverage, and who was not entitled to bring a Jones Act claim, could nevertheless sue a vessel owner for unseaworthiness. This decision was entirely inconsistent with the holding of the Ninth Circuit in *Normile v. Maritime Company of the Philippines*, 643 F.2d 1380 (CA9 1981). This inter-circuit conflict[11] has never been addressed by this Court.[12]

This conflict, however, gives no real solace to the Petitioner. Even if the Fifth Circuit's holding in *Aparicio* is correct, the *Sieracki* remedy would be confined to longshoremen, exempted from the LHWCA, who can claim status as erstwhile seamen aboard the offending vessel, consistent with the *Sieracki* rationale. The Petitioner cannot.

The Petitioner in the instant matter was clearly a member of the crew of his employer's vessel, and entitled to sue his employer under the Jones Act. Under the Fifth Circuit's criteria for determining seaman status – at issue in the *Wilander* case – he was clearly not a member of the crew of the Respondent's unmanned vessels. The reason

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[11] See also *United States Lines, Inc. v. United States*, 593 F.2d 570 (CA4 1979) and *Grice v. A/S J. LUDWIG MOWINCKELS*, 477 F.Supp. 325 (S.D.Ala. 1979).

[12] See *Cormier v. Oceanic Contractors, Inc.*, 696 F.2d 1112 (CA5) cert. den., 464 U.S. 821, 104 S.Ct. 85, 78 L.Ed.2d 94 (1983).

that the Petitioner lacked seaman status as to these vessels was not because of the nature of his duties, but because of the transitory and insubstantial nature of his assignment.

The case is no different than that presented by a shore-based harbor pilot, radio technician, diesel mechanic, or other specialized contractor who boards a vessel to perform a single task. It would not be doubted that a ship's captain, radio officer, engineer or tankerman qualifies for seaman status, even if their duties may be substantially identical to those carried out by shore-based workers. The difference is in the duration of the assignment and in the anticipated scope of the work to be performed.

The petitioner's argument would transform all such shore-based personnel into special-category seamen whenever they board a vessel to provide services, if those services are sufficiently nautical in character to be considered seamen's work. This expansive notion discredits the connection that ought to exist between an individual seaman and a particular vessel, which is the irreducible basis that supports a worker's status as a member of a crew.

* * *

The only decision sited by the Petitioner as adverse to the decision below, and as threatening the harmony of maritime law, is *Mahramas v. American Export Isbrandtsen Lines, Inc.*, 475 F.2d 165 (CA2 1973), a decision that is of no particular importance to the analysis of seaman status. The *Mahramas* decision involved a hairdresser employed by a beauty shop aboard a passenger liner. She was

required to have seaman's papers and sign ship's articles, but she was not directly employed or paid by the vessel owner. The Second Circuit, with its focus upon "tradition," seemingly could not accept a hairdresser as a seaman, being of the belief that the plaintiff "was not performing any of the historic functions of a ship's crew"; nevertheless, the plaintiff was considered to be a "seaman" for purposes of the Jones Act. *Id.* at 170. The plaintiff was also given a remedy for unseaworthiness for her shipboard accident, because she performed "ship's service" by arrangement of the owner. *Id.* at 169. This decision thus reaches the right result under the wrong rationale. Surely a hairdresser in a beauty salon aboard a luxury passenger vessel is as much a member of that specialized ship's crew as any roustabout assigned to work on a movable drilling rig, or, for that matter, the cook, fireman and bartender referred to in an earlier Ninth Circuit decision. "Seamen" do not have to be "sailors." The notion of "historic functions" in this context is an irrelevance. And, if the "historic functions" of sailors are deemed important, the fact remains that the Respondent's barges, like thousands of barges operating on the inland waterways, are intended to be unmanned, and carry no crew.

CONCLUSION

It is not the ambition of this brief to propose a formula which would resolve the problems that attend the definition of seaman status. It is instead sufficient to observe that any criteria used to define a "seaman" will

necessarily define the scope of the warranty of seaworthiness. There should be no gap between the two: if a worker is considered a seaman, a warranty of seaworthiness should be owed by the vessel or vessels to which that status is attached. The warranty of seaworthiness ought not to be detached from the vessel upon which a worker is a member of the crew and applied to every other vessel where the worker may, from time to time, perform incidental "seaman's" work.

Respectfully submitted,

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